

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 17, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2014AP1166

Cir. Ct. No. 2009FA659

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

MARY ELLEN MATTHEWS,

JOINT-PETITIONER-RESPONDENT,

v.

DONALD EARL MATTHEWS,

JOINT-PETITIONER-APPELLANT.

APPEAL from an order of the circuit court for Rock County:
BARBARA W. MCCRORY, Judge. *Affirmed.*

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Donald Matthews appeals from an order of the circuit court revising and extending his obligation to pay maintenance to his former spouse, Mary Matthews. For the reasons explained below, we affirm.

BACKGROUND

¶2 Donald and Mary were divorced in 2010. At the final hearing, the parties filed a written Marital Settlement Agreement which contained the following term concerning maintenance:

The husband shall pay maintenance to the wife in the amount of \$430.00 per week beginning on the first day of the month of October 2010. Maintenance shall end on the last day of the month of September 2013 or until the wife remarries, dies or by court order, whichever comes first.
ADDITIONAL AMENDMENTS ATTACHED.

No additional amendments are found in the record, but the following testimony given at the same hearing indicates that the language quoted here does not represent the entire agreement of the parties.

¶3 On direct examination, Mary's attorney questioned her as to her understanding regarding maintenance:

Q. I'm going to quickly recite the main parts of the maintenance agreement, and I want you to tell me if that is your understanding.

A. Okay.

Q. For the first three years following today, you will receive [\$]430 per week from Mr. Matthews. For the next three years you'll receive [\$]215 per week from Mr. Matthews. Is that—are those the amounts we discussed?

A. Yes, they are.

Q. You understand that certain things could happen to Mr. Matthews' employment that could result in reducing or suspending maintenance[,] is that correct?

A. Yes, I do understand that.

Q. And you understand that he would—if he is under those conditions wouldn't be required to make up missed payments? Do you understand that?

A. Yes, I understand that.

Q. Now, the agreement also requires that you waive maintenance above those amounts for more—and for the period after six years. Do you understand that?

A. Yes, I do.

Q. And you agree to waive maintenance beyond that which is ordered today?

A. Yes.

Q. And do you understand that by waiving maintenance or that partial waiver of maintenance, you can't come back to the court and ask for more?

A. Yes, I understand that.

On cross-examination, Donald's attorney briefly revisited Mary's understanding of the maintenance agreement:

Q. Mrs. Matthews, just to make it clear for maintenance, you understand your husband is permanently waiving any right to ask for maintenance at any time for any purpose?

A. Yes, I do understand that.

Q. But you are doing I guess in effect a partial waiver; is that correct? Well, specifically, you understand that you are giving up the right to ever come back to court and ask for more than [\$]430 per week for the first three years, correct?

A. Yes.

Q. And you are giving up the right to ever come back to court and ask for more than [\$]215 per week for the next three years?

A. Yes.

Q. And you're giving up the right to ever come back to court and ask for maintenance to be extended beyond six years for any reason, correct?

A. Yes.

¶4 The Findings of Fact issued by the court in support of the judgment of divorce contained the following provisions regarding the parties' obligations with regard to maintenance:¹

10. B. Commencing October 1, 2010, Donald shall pay maintenance to Mary in the amount of \$430 per Week. Maintenance for this amount shall end on the last day of the month of September 2013, or until Mary remarries, dies or by court order, whichever comes first. Commencing October 1, 2013, Donald shall pay maintenance to Mary in the amount of \$215 per week. Maintenance for this amount shall end on the last day of the month of September 2016, or until Mary remarries, dies or by court order, whichever comes first. Maintenance from Donald shall not be required during any future periods of Donald's unemployment, due to involuntary job termination, or involuntary layoff. Donald shall not be required to make up maintenance from such periods of unemployment. Maintenance from Donald shall be terminated if he is unable to work from disability. Maintenance from Donald shall be reduced, if his salary is reduced. The percentage used to calculate the reduced maintenance will be the same percentage as the husband's salary reduction.

11. Donald knowingly and voluntarily waives his rights to receive maintenance from Mary now or in the future. Mary waives her right to receive maintenance above the amounts and durations specified in the parties' maintenance agreement stated orally in open court.

¹ The Conclusions of Law and Judgment issued by the court recites the exact same language contained in paragraph 10B of the Findings of Fact, which we quote in the text. However, instead of the language shown as paragraph 11 of the Findings of Fact, which we also quote in the text, the Conclusions of Law and Judgment recites:

14. **Termination of Maintenance.** Pursuant to [WIS. STAT. §] 767.59(1c)(b) Donald has specifically and irrevocably waived any rights he may have to claim or receive maintenance payments at any time, now or in the future. Mary waived her right to receive maintenance above the amounts and durations specified in this Judgment.

¶5 In July 2013, Mary moved the circuit court to revise her maintenance award in advance of the October 2013 reduction called for in the judgment of divorce. Over Donald's objection, the circuit court granted Mary's motion and entered an order on April 7, 2014, continuing Donald's maintenance obligation at \$325 per week, indefinitely. Donald appeals.²

DISCUSSION

¶6 On appeal, Donald raises two issues. First, Donald argues that the court erred by not giving full effect to the section of the judgment of divorce addressing what Donald views as the complete waiver by Mary of maintenance beyond that stipulated to by the parties, as summarized above, which he argues precluded the alteration of maintenance. Second, Donald argues that, even if modification of maintenance were an option available to the court, the evidence was insufficient to support the court's finding that there was a substantial change in circumstances justifying modification. For reasons that follow, we reject both arguments.

A. Standards of Review

¶7 Generally, issues involving maintenance are addressed to the circuit court's discretion. See *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). Our supreme court explained in *Hartung*:

² The circuit court's order increasing and extending Donald's maintenance obligation was dated February 20, 2014, and filed April 7, 2014. On February 27, 2014, Donald moved the circuit court for a reduction in his maintenance obligation due to his unemployment. The circuit court granted this February 27 motion on April 14, 2014, and reduced Donald's maintenance obligation to \$100 per week until Donald obtains new employment. The court's April 14 order temporarily reducing Donald's maintenance obligation is not at issue on appeal.

[T]he exercise of discretion is not the equivalent of unfettered decision-making. A discretionary determination, to be sustained, must demonstrably be made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law. Additionally, and most importantly, a discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination. It is recognized that a trial court in an exercise of its discretion may reasonably reach a conclusion which another judge or another court may not reach, but it must be a decision which a reasonable judge or court could arrive at by the consideration of the relevant law, the facts, and a process of logical reasoning.

Id. (internal citations omitted).

B. Mary Did Not Waive The Right To Modification of Maintenance

¶8 Donald argues that Mary waived the right to have her maintenance award modified. Donald bases his argument on the law of waiver, pointing out that the term “waiver” was used by the circuit court in characterizing Mary’s testimony that maintenance was not modifiable. While Donald argues at length about the concepts involved in the concept of waiver, he provides no authority that waiver applies in this situation, let alone that it controls here. Instead, he cites *Fobes v. Fobes*, 124 Wis. 2d 72, 77-78, 368 N.W.2d 643 (1985), *abrogated on other grounds by Rohde-Giovanni v. Baumgart*, 2004 WI 27, 269 Wis. 2d 598, 676 N.W.2d 452, which Donald interprets to prohibit circuit courts from modifying maintenance if a limitation on maintenance is incorporated into a divorce judgment. We reject this argument because *Fobes* explicitly defeats the argument that Donald makes.

¶9 Our supreme court in *Fobes* addressed the ability of a circuit court to alter maintenance in situations in which the parties initially agreed that maintenance cannot be altered, stating:

On its face, [WIS. STAT. §] 767.32, provides that circuit courts have the authority to modify divorce judgments with respect to maintenance payments upon petition of either party so long as the modification could have been ordered by the court at the time of the divorce. Only if maintenance has been waived [under § 757.59(1c)(b)] and such waiver has been incorporated into the judgment is the court foreclosed from revising the judgment with respect to maintenance.

In *Dixon v. Dixon*, 107 Wis. 2d 492, 319 N.W.2d 846 (1982), this court was called upon to decide whether an award of limited maintenance could be modified when the original judgment had provided that the limited maintenance payments would not be increased or decreased by virtue of any change in the economic circumstances of either party. Following a trial, the court had ordered [the husband] to pay [the wife] maintenance in the amount of \$500 per month for thirty months. [The wife] asserted that the divorce judgment's prohibition against modification violated [WIS. STAT. §] 767.32, [] which expressly authorizes a court to revise a judgment providing for maintenance payments. [The husband] argued that, if alteration of limited maintenance payments were allowed, a significant distinction between limited and indefinite maintenance would be lost.

We stated that prohibiting modification of limited maintenance does provide certainty to the parties and curtails the number of future court hearings. However, we noted that “[t]here is nothing ... in [WIS. STAT. §] 767.32 to indicate that the legislature intended the goals of economic certainty and reduced litigation to be achieved at the expense of spouses whose needs might change after judgment is entered.” *We held that [§] 767.32 allows the circuit court to revise and alter a judgment respecting the amount and terms of payment of limited maintenance so long as the petition seeking revision is filed prior to the termination date of limited maintenance under the judgment.*

Fobes, 124 Wis. 2d at 77-78 (internal citations omitted and emphasis added). As the emphasized final sentence establishes, circuit courts have the authority to do precisely what the circuit court did here.

¶10 It is true that, even if a former spouse may seek modification of limited maintenance under *Fobes*, a party may be estopped from doing so if certain conditions are met.³ However, Donald has placed all of his eggs in the “waiver” basket, and fails to develop an estoppel-related argument in his principal

³ Our supreme court explained as follows in *Nichols v. Nichols*, 162 Wis. 2d 96, 103-104, 469 N.W.2d 619 (1991):

As a general rule, maintenance is always subject to modification upon a showing of the requisite change in circumstances. However, in *Rintelman [v. Rintelman]*, 118 Wis. 2d 587, 596, 348 N.W.2d 498 (1984)], we recognized an exception to the general rule that maintenance is always subject to modification when we held that a party is estopped from seeking modification of the terms of a stipulation incorporated into a divorce judgment if[:]

both parties entered into the stipulation freely and knowingly, ... the overall settlement is fair and equitable and not illegal or against public policy, and ... one party subsequently seeks to be released from the terms of the court order on the grounds that the court could not have entered the order it did without the parties’ agreement. The stipulation in *Rintelman* provided for nonmodifiable maintenance and met the criteria set forth above. Accordingly, we held that the payor spouse was estopped from seeking a modification in maintenance even though the payee spouse had remarried and [WIS. STAT. §] 767.32(3) provides that maintenance shall terminate upon motion of the payor spouse after the payee spouse has remarried.

Thus, *Rintelman* stands for the proposition that the consent of the parties to nonmodifiable maintenance makes such a maintenance provision in a divorce judgment enforceable notwithstanding the provisions of [WIS. STAT. §§] 767.32(1) and 767.08(2)(b) that maintenance is always subject to modification.

brief. We will, therefore, not discuss the issue further here. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we need not address undeveloped arguments).

¶11 Donald argues, for the first time in his reply brief, that the circuit court was precluded from modifying the maintenance award under WIS. STAT. § 767.59(1c)(b) (2013-14),⁴ which provides in pertinent part that a “court may not revise or modify a judgment or order that waives maintenance payments for either party.” We generally do not address issues or arguments raised for the first time in a reply brief, *see Richman v. Security Sav. & Loan Ass’n*, 57 Wis. 2d 358, 361, 204 N.W.2d 511 (1973), and decline to do so here. This appears to present an open question of law and we do not have the benefit of full briefing on this issue.

*C. There was Sufficient Evidence for the Court to
Find a Substantial Change in Circumstances*

¶12 Donald also argues that the circuit court erred in finding that a substantial change in circumstances permitted the court to modify Mary’s maintenance award because there was insufficient evidence of a substantial change. While a circuit court’s decision to grant maintenance and the amount is an exercise of discretion, the question of whether there has been a substantial change in circumstances presents a mixed question of fact and law. *Murray v. Murray*, 231 Wis. 2d 71, 72, 604 N.W.2d 912 (Ct. App. 1999). “We will uphold a [circuit] court’s findings regarding a change in circumstances unless they are clearly erroneous. However, whether the change is substantial is a question of law which we review de novo.” *Id.* (internal citation omitted). We do, however, give

⁴ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

weight to the court’s decision, despite our de novo standard of review, because the legal determination of whether there has been a substantial change is intertwined with the court’s factual findings. *Id.*

¶13 Donald does not challenge any pertinent fact found by the circuit court, but argues that there was little evidence of a substantial change in circumstances. Donald asserts that his income had increased only slightly, “by a mere \$2,000 per year,” and that he has little job security. Donald acknowledges that he received an inheritance in the form of a partial interest in a house, which relieved him of the obligation to pay rent. He argues, however, that he had to purchase another party’s interest in the house. In terms of Mary’s circumstances, Donald argues that little changed between the time of the judgment of divorce and her request to modify her maintenance. Donald asserts that at both points in time, Mary was in good health, was working part time, and Mary was still paying rent, but that obligation was partially offset by the contributions of her children who lived with her. Donald also points out that the court found that Mary had done little to improve her job skills and had described Mary’s efforts to find employment as “anemic.”

¶14 In its order modifying maintenance, the court set forth a chart detailing the parties’ circumstances at the time of the judgment of divorce and at the time of Mary’s request for modification. We now set forth that chart:

Facts in October 2010	Facts in December 2013
Mary was self-employed as an in-home tutor. She earned approximately \$444 per month.	Mary worked as a substitute teacher for various school districts. In November 2013, she earned \$782.50.
Donald was earning \$63,000 per year.	Donald was earning \$65,000 per year.

The parties' adult children were living with Mary.	The parties' adult children were living with Mary.
Donald was living alone.	Donald was living alone.
Mary did not have a mortgage [or] rent payment.	Mary paid \$800 per month for rent.
Donald was renting an apartment.	Donald lives in a house he inherited from his father. He needs to buy his brother's one-half interest in the house.
Mary had no debt because of a bankruptcy.	Mary has credit card and medical debt totaling \$3,185.
Mary did not have a teaching license.	Mary did not have a teaching license.
Mary was a licensed substitute teacher in certain school districts.	Mary was a licensed substitute teacher in certain school districts.
Mary was in good health.	Mary was in good health.
Mary did not take any regular medications.	Mary takes medication for depression and anxiety.
Mary's household budget was \$1,900.	Mary's household budget (minus expenses she pays for her adult children) was \$2,000.
Donald's household budget was \$1,700.	Donald's household budget was \$1,600.
Mary had \$26,000 in retirement accounts.	Mary had \$22,000 in retirement accounts.
Donald had \$26,000 in retirement accounts.	Donald had \$36,343 in retirement accounts.

The court also found that “[s]ince the divorce, Mary has done little to prepare herself or look for full[-]time employment,” and discussed Mary’s failure to become self-supporting in the context of the effect it would have on a determination of whether there had been a substantial change in circumstances.

The court stated:

In this case, I am concerned that Mary has done very little to improve her skills for employment. If she were before me on a child support contempt action, her job search efforts would most likely lead to a contempt finding. However, this is not a contempt action, but a maintenance modification action.

The circuit court quoted extensively from *Lemke v. Lemke*, 2012 WI App 96, ¶¶8-9, 343 Wis. 2d 748, 820 N.W.2d 470, wherein we stated:

One baseline standard is found in *LaRocque v. LaRocque*, 139 Wis. 2d 23, 35, 406 N.W.2d 736 (1987), where the court noted that “[a] court must not reduce the recipient spouse to subsistence level while the payor spouse preserves the pre-divorce standard of living.” In the context of maintenance changes, the court stated: “The circuit court must not prematurely relieve a payor spouse of a support obligation lest a needy former spouse become the obligation of the taxpayers.” *Id.* at 41.

Turning to the relevance of efforts made by parties to earn income in this context, the presence or absence of such efforts are to be considered as factors, but only minor ones. In *Vander Perren v. Vander Perren*, 105 Wis. 2d 219, 229-30, 313 N.W.2d 813 (1982) (citation omitted), the court explained:

We believe that a party’s lack of initiative or effort to become self-supporting is a relevant factor for a court to consider in awarding or terminating maintenance. We do not, however, believe that such consideration may be raised to a determinative status.

¶15 In the present case, after reviewing some additional precedent, the circuit court concluded that there had been a substantial change in circumstances:

It is unfortunate that the divorce judgment and stipulated divorce hearing did not address the reasons for the maintenance amount, duration and reduction after three (3) years. I do not know what they expected Mary to achieve within the three (3) years that would warrant reducing her maintenance to \$215 per week. What I do know is that Mary's income has not increased to a point where she can support [herself] at any level, let alone the level the parties enjoyed during their marriage. Her net worth is less than it was when the parties divorced.

Donald's financial situation has improved. He is earning more income than he did in 2010. He also inherited one-half interest in a \$60,000 house. His retirement accounts increased by \$10,000. Since the divorce, Donald's net worth increased more than \$40,000.

Mary's effort to obtain employment is only a "minor" factor to consider. The most important factor to consider in this case is that cutting Mary's maintenance in half would put her well below the standard of living the parties enjoyed during the marriage while Donald's standard would increase substantially. For this reason, I do find there has been a substantial change in circumstances since the divorce judgment.

¶16 To summarize, the circuit court found that circumstances were substantially changed based upon the following: (1) if support were reduced, Mary would be unable to support herself "at any level," and thus be "reduced to subsistence level" or worse, and certainly not at the level enjoyed during the marriage; and (2) Mary's net worth had declined, while Donald's had increased by \$40,000. Mary's lack of effort to obtain fulltime employment was considered by the court, but, consistent with the discussion in *Lemke* quoted above, concluded that this factor was not determinative.

¶17 Applying the standard of review, we first accept the circuit court's factual finding that there has been a change in circumstances. Neither party argues that this finding is clearly erroneous. Thus, the final issue before us is whether that change is substantial.

¶18 In determining whether a change in circumstances was substantial, we have looked at both the support purpose of maintenance, and the fairness purpose. *See id.* We stated in *Lemke*:

“Fairness” has a special meaning under the law of maintenance. “We believe that a reasonable maintenance award is measured not by the average annual earnings over the duration of a long marriage but by the lifestyle that the parties enjoyed in the years immediately before the divorce and could anticipate enjoying if they were to stay married.” Thus, the recipient spouse is entitled, assuming that the payor spouse’s income permits it, to enjoy his or her life at the standard that he or she “could anticipate enjoying” but for the divorce.

Id., ¶10 (internal citation and emphasis omitted).

¶19 We agree with the circuit court that the change of circumstances in this case was substantial. Donald’s net worth and income have both improved, in part, as a result of inheritance. Mary’s financial situation continues to worsen, to the point where her ability to support herself is threatened. One goal of the maintenance award in the divorce judgment was to satisfy Mary’s need for support, and it is clear that it is not meeting that goal. Further, if the maintenance award in the judgment contemplated Mary being able to contribute more toward her own support in three years’ time, that expectation has clearly not come to pass, even though the court found that Mary’s lack of initiative appeared to have contributed to some degree to this outcome. We agree with the circuit court that, given *Lemke*’s admonition that “such considerations may [not] be raised to a determinative status,” Mary’s need for support is not outweighed by her lack of effort for purposes of considering whether there has been a substantial change in circumstances. *Id.*, ¶9 (quoted source omitted). Thus, it is a reasonable inference that the situation of both Mary and Donald is substantially different, with their standards of living moving in opposite directions, than was contemplated when the

original maintenance was awarded. Accordingly, we conclude that Donald's contention that there was not a substantial change in circumstances is without merit.

CONCLUSION

¶20 For the reasons discussed above, we affirm the decision of the circuit court.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

